CLOSING BRIEF OF APPELLANT

United States Court of Appeals

NINTH CIRCUIT

NO 20917

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

MICHAEL ALLAN McCOWAN,

Defendant-Appellant

Appeal from the United States District Court,
Southern District of California, Central
Division, Honorable Charles H. Carr, Judge.

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The facts and evidence in this case have been summarized in our Opening Brief, so we shall briefly herein refer only to the facts we deem most pertinent. We have discussed the law also sufficiently in said brief, so herein we shall only very briefly reiterate such points as we believe should be emphasized; namely, Points I and III-A.

I

We again assert that the trial court should have acquitted the defendant on the ground that, since Sections 1702 and 1708 of Title 18, U.S.C., do not apply to this case, the trial court lacked jurisdiction to convict him.

The facts clearly showing lack of jurisdiction were as follows: Defendant became acquainted with two sisters, Jean Ortiz and Joan Ansel. They entrusted him with certain fur coats, jewelry, guns, and a surgical kit used by Joan to remove a bullet from her husband's body. Joan went East and before leaving entrusted three diamond rings to McCowan. Later, Jean Ortiz told McCowan her sister wanted the rings, and together Ortiz and McCowan wrapped them in a package. McCowan, in the presence of Ortiz and with her acquiescence, consent and approval, addressed the package to Joan Ansel and placed his name on the package as sender but with the

post box number of Joan Ansel. Together he and Ortiz went to the post office and mailed the package, both standing together when it was presented to the postal clerk. He gave the money for the postage. Later, by using Form 1509, a sender's application for recall of mail, he obtained the package. The rings were thereafter sold by him.

Appellant contends that since he was either the sender or the agent for the sender, as the evidence establishes, he committed no offense under Sections 1702 and 1708 of Title 18, U.S.C. His offense, if any, was embezzlement or theft as an agent of his principal's property. For this he would be subject only to prosecution under California law. The rings were entrusted to him by Joan Ansel and he would be answerable to her as agent or bailee, but he committed no offense under the Federal statutes aforesaid.

This position is substantiated by the cases cited and quoted from in our Opening Brief (pp. 47-50), which seem to be the only cases pertinent to the issue; namely, *United States v. Bullington*, 170 Fed. 121; *United States v. Safford*, 66 Fed. 942; *United States v. Parsons*, 2 Blatchf. 104, Fed. Cas. No. 16,000; and *United States v. Driscoll*, 1 Lowell 303, Fed. Cas. 14,994.

The *Bullington* case held that any delivery to the writer before its conveyance in the mail, or to the agent of the writer, ended the authority of the government over the mailed item.

The above rule directly applies to the instant case, as McCowan was either the sender of the rings to Joan Ansel, who had entrusted them to him, or was her agent in mailing them to her. It must be noted that there was no evidence that Joan communicated directly with him to return the rings. The communication came through Jean, who told him her sister wanted them mailed. McCowan would have been justified in refusing so to do or to deliver the rings to Jean without positive authorization from Joan.

Furthermore, McCowan could also be considered as the sender or as the agent of Jean Ortiz in mailing the rings, since his name was placed on the package as sender, and this was done with Jean's authorization, consent and approval.

Whether he was considered as the sender of the package to Joan, as her agent, or as the agent of Jean Ortiz, he was nevertheless entitled, under Sections 1702 and 1708 of Title 18, to withdraw the package from the mail.

In our Opening Brief we quoted at length from the *Safford* case (pp. 48-50), but we feel a portion of the quotation deserves repetition. The Court stated:

> "It would be reprehensible to assume that congress made a pretext of this power to establish rules of good conduct and punish violations of them between a principal and agent or to promulgate police regulations independent of the postal service, and after the postal functions had been performed. Such matters are of local concern, amenable to state law. It is but just that one who, having been delegated by another to receive his mail, and, having received it, should embezzle it, should be punished; . . . but we should not allow our anxiety to suppress immoralities and punish crime to cause us to ignore the proper tribunals and proper authority for the redress of grievances of this character. So a statute, broad in its terms, will be restricted by construction to the objects which the legislature had in view, and especially will its terms be restricted within the organic authority of the enacting body."
>
> *United States v. Safford, supra,*
> 66 Fed. Rptr. 942.

It would clearly appear that while McCowan may be subject to prosecution by the State of California for theft or embezzlement as agent of his principal's property, he was not subject to prosecution under the Federal law herein involved, and he should, therefore, have been acquitted of the charges.

II

Under Point III-A of the Opening Brief, we pointed out that the defendant was denied a fair trial as guaranteed by the Constitution, because after the first trial in which the jury disagreed, the first indictment was dismissed and a new indictment was filed, tailored to meet the evidence introduced at the first trial. The wording of the second and superseding indictment was materially changed, so that defendant had to meet different charges based on evidence introduced in the first trial. If the original indictment wording had not been changed, defendant would have been in a much better position to secure an acquittal. Since, by the superseding indictment, he was placed in a materially more disadvantageous position, he was denied a fair trial.

We have discussed this point in the Opening Brief (pp. 2-5, 54-55) and in the Motion to Dismiss, a copy of which is included in the Clerk's Transcript, to which reference is made, so we shall not belabor the point further.

CONCLUSION

In conclusion, we respectfully submit that the judgment of conviction should be reversed and the appellant acquitted

of the charges.

Respectfully submitted,

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PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss.
County of Los Angeles)

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Los Angeles, over the age of eighteen years and not a party to the within action or proceeding; that

My business address is 215 West Fifth Street, Los Angeles, California 90013, that on January 19th, 1967, I served the within CLOSING BRIEF OF APPELLANT (United States v. McCowan - No. 20917) on the following named party by depositing three copies thereof, inclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the Cityof Los Angeles, California, addressed to said party at the address as follows:

United States Attorney
Sixth Floor, Federal Building
Los Angeles, California

I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 19th, 1967, at Los Angeles, California.

D. A. Standefer

Subscribed and sworn to before me
this day of January, 1967.

Notary Public in and for
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